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IN THE
COURT OF APPEALS OF INDIANA

DAVID ALVERSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 30A04-0406-CR-298
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HANCOCK SUPERIOR COURT
The Honorable Terry K. Snow, Judge
Cause No. 30D01-0303-FC-76

October 18, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

David Alverson appeals his convictions for child exploitation and possession of child pornography. Alverson contends that the trial court abused its discretion when it refused to exempt his witness, Wayne Reynolds, from the State's motion for separation of witnesses and when it excluded Reynolds' opinion testimony. Furthermore, he contends that the trial court abused its discretion when it denied his motion to reopen the record for rebuttal testimony. Finally, Alverson contends that the evidence is insufficient to support his conviction for child exploitation. We find that Alverson failed to demonstrate that Reynolds should have been exempted from the motion for separation of witnesses or that Reynolds' opinion testimony was admissible either as expert or skilled witness testimony. We further find that the trial court properly declined to reopen the case because Alverson sought only to admit cumulative testimony, and we find that the evidence is sufficient to support Alverson's conviction for child pornography. Accordingly, we affirm the trial court in all respects.

Facts and Procedural History

In October 2002, David Alverson rented a computer from a Rent-A-Center store in Greenfield, Indiana. Alverson's roommate and girlfriend, Sabrina Dotson, co-signed the rental agreement. It is undisputed that the computer was new and that no other person had ever rented the machine. Upon returning the computer to Rent-A-Center in March 2004, Alverson told customer account manager Tyler Ferree, "[Y]ou guys might want to check out what I have downloaded on the computer. I think you might like it." Tr. p. 43. Kurt Smutzer, the assistant store manager, overheard Alverson's comment and decided to

review the files downloaded to the computer with the assistance of the store manager. They discovered that a large amount of pornography was stored on the computer's hard drive, including various images of what appeared to be child pornography.

The store manager called the Greenfield Police Department and the police officers who viewed the images stored on the computer agreed that they appeared to include child pornography. The officers requested a detective to pursue an investigation, and Lt. John Jester responded. He inspected the computer, saw images of what he believed to be child pornography, and seized the computer. It was delivered to Lt. Joseph Munden, a computer investigator and officer in charge of the evidence room at the Greenfield Police Department. Lt. Munden inspected the computer files, but he did not perform any operations that would have modified any of the information contained on the computer. He discovered numerous files on the computer depicting child pornography and with file names indicative of child pornography (e.g., "xchild porn kiddy underage illegal (1)(2).mpg").

On March 31, 2003, the State charged Alverson with Child Exploitation, a Class C felony,[1] and Possession of Child Pornography, a Class D felony.[2] A jury trial was held on March 8-9, 2004. At the beginning of the trial, the State moved for separation of the witnesses, and Alverson objected. Among the witnesses Alverson anticipated calling was Wayne Reynolds, a purported computer expert. Alverson argued that because the trial would involve highly technical testimony regarding computers, Reynolds needed to hear

[1] Ind. Code § 35-42-4-4(b).

[2] Ind. Code § 35-42-4-4(c).

that testimony in order to respond to it. The trial court nevertheless granted the State's motion, and the State presented its case.

Later in the trial, Alverson sought to have Reynolds qualified as an expert witness with regard to computer technology. However, the State established that Reynolds has no formal education with regard to computers, nor is he certified in the use of the operating system installed on the computer containing the pornography. The State objected to Reynolds' identification as an expert witness, and the trial court withheld its decision, indicating that if the testimony demonstrated a need at some point for Reynolds to be qualified as a witness, the issue could be revisited. Alverson never again sought to have Reynolds qualified as an expert, however, and the matter did not resurface at trial.

Reynolds went on to testify regarding the organization of the computer's desktop and the files known to belong to Alverson as compared to those containing pornography. His testimony indicated that the computer contained at least two accounts, one a password-accessed administrator account belonging to Alverson and one a guest account, which could be accessed without a password. Reynolds testified that the files that had been downloaded on Alverson's account were saved and organized into folders in a manner different from the manner in which those files downloaded to the guest account were saved and organized. He opined that Alverson's account was set up and organized in a manner consistent with use by someone considerably familiar with computers, Tr. p. 147-48, while the guest account was set up and organized in a manner consistent with computer use "by somebody who doesn't know a lot about computers," *id*. at 152. Alverson's counsel then asked Reynolds, "based upon your research and looking at the

computer and doing these exhibits and so forth, do you have an opinion as to whether [Alverson] was the person who downloaded the child pornography?" *Id*. at 166. The State objected, however, and the trial court sustained the objection. Following Reynolds' testimony, the defense rested its case, and court was adjourned for the day.

When court resumed the following day, Alverson moved the court to reopen the record based on information allegedly discovered through conversations with Reynolds regarding the State's testimony, to which Reynolds had not previously been privy because of the order for separation of witnesses. Alverson argued that Reynolds had provided insight into aspects of the State's evidence that justified his recall as a rebuttal witness, specifically regarding the question of whether any adult pornography was found on the computer. The State pointed out, however, that Reynolds had previously testified that he did not open the pornographic files he found on the computer, and so he could not testify regarding their contents. After listening to the State's argument, the trial court found that the testimony that Reynolds would rebut had been sufficiently probed during its presentation, and it denied Alverson's motion to reopen. The jury subsequently found Alverson guilty on both the child exploitation and possession of child pornography counts, and he was later sentenced to a term of four years with three years suspended to probation.[3] Alverson now appeals his convictions.

[3] The sentencing order, transcript, and CCS lack any indication regarding how much of Alverson's sentence was attributed to the child exploitation conviction and how much to the possession of child pornography conviction. The trial judge simply sentenced Alverson—generally—to four years with three suspended to probation.

Discussion and Decision

Alverson raises four issues on appeal: whether the trial court abused its discretion when it (1) refused to exempt Reynolds from the State's motion for separation of witnesses; (2) excluded Reynolds' opinion testimony regarding whether Alverson downloaded child pornography to the computer's guest account; (3) denied Alverson's motion to reopen the record for rebuttal testimony; and (4) whether the evidence is sufficient to convict Alverson of child exploitation. We address each issue in turn.

I. Abuse of Discretion

The standard of review for each of the first three issues presented by Alverson requires us to determine whether the trial court's decisions constituted an abuse of its discretion. *See Osborne v. State*, 754 N.E.2d 916, 926 (Ind. 2001) (whether a witness qualifies for exemption from an order separating witnesses under Indiana Rule of Evidence 615 is a matter for the trial court's discretion); *Carpenter v. State*, 786 N.E.2d 696, 702 (Ind. 2003) ("As a general matter, the decision to admit or exclude evidence is within a trial court's sound discretion and is afforded great deference on appeal."); *Saunders v. State*, 807 N.E.2d 122, 126 (Ind. Ct. App. 2004) ("Whether to grant a party's motion to reopen its case after having rested is a matter committed to the sound discretion of the trial judge."). Where a matter is entrusted to the discretion of the trial court, we will reverse its decision only upon a finding that the decision "is clearly erroneous and against the logic and effect of the facts and circumstances before the court or it misinterprets the law." *Carpenter*, 786 N.E.2d at 702-03.

A. IRE 615: Exemption of Witness from Separation Order

Alverson first contends that the trial court abused its discretion when it refused his request to exempt Reynolds from the order for separation of witnesses. Indiana Rule of Evidence 615 provides exemption from a trial court's order separating witnesses for "(1) a party who is a natural person, or (2) an officer or employee of a party that is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause." Alverson argues that Reynolds falls into Rule 615's third category as an essential witness. "To qualify as an essential witness, a witness must have such specialized expertise or intimate knowledge of the facts of the case that a party's attorney could not effectively function without the presence and aid of the witness." *Stafford v. State*, 736 N.E.2d 326, 329 (Ind. Ct. App. 2000) (internal quotation omitted), *trans. denied*. Further, "Rule 615's exemptions should be narrowly construed and cautiously granted." *Osborne*, 754 N.E.2d at 926.

Alverson alleges that he "clearly established the need for Mr. Reynolds' assistance." Appellant's Br. p. 5. In support of this statement, however, he refers us only to one segment of the transcript, wherein defense counsel made the following argument that Reynolds was an essential witness:

> [Defense]: Our other witness is Wayne Reynolds our computer expert and he needs to be in here to listen to this highly technical testimony by their witnesses. I think separation of witnesses, Judge, is designed to prevent people from copying each other's stories, like for example,—in factual situations did something happen or how did it happen. This is an entirely separate type of witness in that he can't copy anybody. He's [sic] simply needs to be in here to know what they said because it's a highly technical type of testimony—so that he can respond to it.

Tr. p. 15-16.

Alverson's argument on this point is deficient in two respects. First, as we will cover in a later section, Reynolds was never qualified as an expert witness before the trial court, and absent such qualification, his expertise—and thus the essential need for his presence during other witnesses' testimony—is questionable.

Second, even if Reynolds had been or should have been qualified as an expert for the purposes of his testimony, Alverson points to nothing in the record of such a "highly technical" nature that would require counsel to rely on the assistance of a computer expert. Indeed, both at trial and in his appellate briefs, the only testimony to which Alverson ever suggests Reynolds' insight proved helpful was the testimony regarding whether adult pornography had been downloaded onto the computer. But Alverson points to nothing "highly technical" about that determination, and—as the trial court pointed out when it denied Alverson's motion to reopen, also discussed herein—defense counsel adequately questioned the State's witnesses on the presence or lack thereof of adult pornography, *and* Reynolds testified that he did not open any of the pornographic files on the computer, so he could not reliably testify as to their contents, be it adult or child pornography. Therefore, even if Alverson is correct in his assertion that Reynolds should have been exempt from the separation order—and we believe he is not—he has nonetheless failed to demonstrate any prejudice resulting from the trial court's decision. We are not inclined, then, to reverse his convictions pursuant to this claim of what is, at best, harmless error.

B. Witness's Opinion of Identity of Computer User

Alverson next alleges that the trial court abused its discretion when it sustained the State's objection to Reynolds' proffered testimony stating his opinion as to whether Alverson downloaded the child pornography files found on the computer. Alverson contends that "Mr. Reynolds certainly was qualified as an expert pursuant to Ind. Evidence Rule 702," although he acknowledges that "the record is not clear if the Court accepted Mr. Reynolds as a computer expert or not." Appellant's Br. p. 6.

To begin with, we find this second statement to be disingenuous; the record is entirely clear that the trial court declined to qualify Reynolds as an expert witness. *See* Tr. p. 146. Although the court left the door open for Alverson to move for qualification later in the proceedings, it declined to qualify him upon the first motion to do so, and Alverson made no subsequent motion to that effect. Reynolds, without doubt, was not qualified as an expert witness by this trial court.

Moreover, even if the trial court had qualified Reynolds as an expert witness, Alverson failed to demonstrate that the reasoning or methodology underlying Reynolds' testimony is based upon some scientifically valid principal. *See Smith v. Yang*, 829 N.E.2d 624, 626 (Ind. App. 2005). Typically, such a showing must be made subject to the five factors set forth in the United States Supreme Court case of *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 593-94 (1993), which are: "(1) whether the theory or technique at issue can be and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique's operation; and

(5) whether the technique is generally accepted within the relevant scientific community." *Id*. at 626-27. Alverson made no attempt at trial nor on appeal to satisfy any of the *Daubert* considerations.

On appeal, Alverson makes an alternative argument that Reynolds should have been permitted to testify as to his opinion as a skilled witness, pursuant to Indiana Rule of Evidence 701. "A skilled witness is a person with a degree of knowledge short of that sufficient to be declared an expert under Indiana Evidence Rule 702, but somewhat beyond that possessed by the ordinary jurors." *Kubsch v. State*, 784 N.E.2d 905, 922 (Ind. 2003) (quotation omitted). "Under Indiana Evidence Rule 701, a skilled witness may provide an opinion or inference that is '(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.'" *Id*. (citing Evid. R. 701).

The State is correct in pointing out that Alverson failed to raise this argument at the trial level, and therefore it is waived. Waiver notwithstanding, we choose to address Alverson's argument on this point. Reynolds testified regarding the organization of the files and the computer setup and the relevance of that organization to a determination of whether an experienced or novice computer user was likely responsible for the differing organizational schemes evident on the machine. According to Alverson, Reynolds may be qualified, as a skilled witness, to state his opinion as to whether Alverson downloaded the pornographic files on the computer's guest account based on his personal observations regarding the organization of computers by various users and the insight these observations have given him.

Our Supreme Court confronted an analogous case in *Kubsch*. There, a police detective testified regarding his knowledge, based on past investigations and various training seminars, that a murder victim whose face has been covered in some way often indicates that the murderer knew the victim and covered the face in an attempt to objectify that victim. *Kubsch*, 784 N.E.2d at 922. The detective went on to testify for the State that the fact that the victim's face in the case at trial was covered with duct tape indicated, in his opinion, that the murderer knew the victim. The Court found that the detective's testimony could not qualify as skilled witness testimony because his knowledge was based not on his perceptions arising from his investigation of the crime being tried, but on his "understanding of a phenomenon that the State . . . ha[d] not shown to be scientifically reliable"; that is, the detective's testimony was appropriately scrutinized as expert testimony, not skilled witness testimony. *See id*. at 922-23.

Reynolds' knowledge of the organizational habits of computer users, like the detective's knowledge of the habits of murderers in *Kubsch*, could not be based on his perceptions gleaned from his review of any of the evidence in the case at bar. Instead, it must have been based on his understanding of a phenomenon—the organizational habits of advanced versus novice computer users—that had not been shown to be scientifically reliable. As in *Kubsch*, then, his opinions based on that knowledge are not admissible as skilled witness opinions, and Alverson did not show that they meet the test for expert witness opinions. That, coupled with the fact that Reynolds was never qualified as an expert witness, precludes Alverson's argument that Reynolds could have offered opinion

testimony under either Rule 701 or 702. The trial court, then, properly exercised its discretion when it sustained the State's objection to Reynolds' opinion testimony.

C. Motion to Reopen for Rebuttal Testimony

Alverson next argues that the trial court abused its discretion when it denied his motion to reopen the record so that he could present rebuttal testimony by Reynolds. At trial, defense counsel alleged that it had discovered new information, after speaking with Reynolds following the previous day's proceedings, regarding "an implication of—that there was adult pornography on the computer." Tr. p. 184-85. The court recalled that "the testimony was there wasn't any adult pornography on there but the Defendant had testified that he had downloaded some but it wasn't on there at the time, ..." *Id*. at 185. Counsel alleged that this could cause confusion in the minds of jurors, and he indicated that "Reynolds would testify that he had searched the computer thoroughly—and never found any [adult pornography]." *Id*. The State objected and argued that Reynolds had testified previously that he never opened the files he observed on the computer, and therefore his testimony could not indicate whether any of the files contained adult pornography. Further, the State noted, the presence or lack thereof of adult pornography on the computer was covered in previous testimony, so Alverson had a full opportunity to rebut any of that testimony during trial. The trial court denied Alverson's motion to reopen, noting that "[t]here was quite a bit of discussion—testimony from the stand concerning adult pornography, especially on cross examination. I believe [defense counsel] did redirect on that particular witness and the issue was covered." *Id*. at 186.

Even if Reynolds had testified that he found no adult pornography on the computer, the trial court indicated that the evidence already presented indicated that there was no adult pornography found, and therefore Reynolds' testimony would have been merely cumulative of previous testimony. We have held that "[i]t is not an abuse of discretion to refuse to reopen a case to hear further evidence where it is merely cumulative." *Oxendine v. Pub. Serv. Co. of Ind., Inc*, 423 N.E.2d 612, 623 (Ind. Ct. App. 1980). The trial court did not abuse its discretion when it denied Alverson's motion to reopen the record.

II. Sufficiency of the Evidence

Alverson's final argument asserts that the evidence is insufficient to convict him of child exploitation. When reviewing a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of witnesses. *Jones v. State*, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the judgment and the reasonable inferences from that evidence to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. *Id.* We will uphold the conviction if there is substantial evidence of probative value to support it. *Id.*

In order to convict Alverson of child exploitation, the State must prove that he:

knowingly or intentionally:

(1) manages, produces, sponsors, presents, exhibits, photographs, films, videotapes, or creates a digitized image of any performance or incident that includes sexual conduct by a child under eighteen (18) years of age;

(2) disseminates, exhibits to another person, offers to disseminate or exhibit to another person, or sends or brings into Indiana for dissemination or exhibition matter that depicts or describes sexual conduct by a child under eighteen (18) years of age; or

> (3) makes available to another person a computer, knowing that the computer's fixed drive or peripheral device contains matter that depicts or describes sexual conduct by a child less than eighteen (18) years of age; . . . .

Ind. Code § 35-42-4-4(b). The State here is alleging that Alverson is subject to section (b)(3) by virtue of the fact that he returned the computer to Rent-A-Center knowing that it contained child pornography. However, Alverson contends that the State failed to prove that any of the images found on the computer depicted sexual conduct by any person *actually* less than eighteen years of age.

We agree with Alverson that the statute does require the State to prove beyond a reasonable doubt that at least one of the persons depicted in the pornographic images was under the age of eighteen. Our Supreme Court affirmed that where age is an element of a crime, this is the State's burden. *See Staton v. State*, --- N.E.2d ---, 2006 WL 2553485 (Ind. Sept. 6, 2006) (holding that where the age of the defendant was an element of the crime of sexual misconduct with a minor, the State was required to prove the defendant's age beyond a reasonable doubt). However, the *Staton* Court also held "that circumstantial evidence can be sufficient to prove age." *Id*. at *3. Moreover, the Court held that where such testimony remains unchallenged, "[i]ts weight and credibility are facts for the jury to assess." *Id*. at *4.

In Alverson's case, the State presented testimony by several witnesses that some of the persons depicted in the images on the computer appeared to them to be underage. Smutzer, the Rent-A-Center assistant manager, testified that he remembered an image depicting a girl he estimated to be seven-to-eight years of age engaged in a sex act. Tr. p.

50. Lt. Jester testified that the children in the images appeared to be under sixteen years of age. *Id*. at 62. And Lt. Munden testified that the images contained "some people that definitely appear to be under the age of eighteen (18)." *Id*. at 78. In addition, the jury was permitted to view the files on the computer and so was able to assess the age of the persons in those images for itself. Finally, evidence was admitted regarding the names of the files, many of which indicated that the files contained child pornography. As in *Staton*, while all of this evidence is rebuttable as to the age of the persons in the images found on the computer, where it remained unrebutted by the defendant despite the opportunity to do so, its weight and credibility were for the jury to assess. It is sufficient circumstantial evidence of age.

Accordingly, the opinion of the trial court is affirmed in all respects.

Affirmed.

BAKER, J., and CRONE, J., concur.